

NG CHOOI KOR

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v.

ISYODA (M) SDN BHD

COURT OF APPEAL, PUTRAJAYA

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SURIYADI HALIM OMAR JCA

ZAINUN ALI JCA

AHMAD MAAROP JCA

[CIVIL APPEAL NO: W-02-693-2004]

16 SEPTEMBER 2009

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CONTRACT: Goods sold and delivered - Claim for payment - Defence that goods not ordered by defendant but by a third party - Statements of account, invoices and delivery orders containing defendant's rubber stamp marks - Totality of evidence leading to conclusion that goods delivered upon defendant's request - Defendant liable to pay

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EVIDENCE: Documentary evidence - Admissibility- Statutory declaration and affidavit marked as ID - Decision by trial judge to admit both documents - Weight attachable to both documents severely affected as maker could not be cross-examined - Unsafe to rely on both documents as credible basis to make finding of facts

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EVIDENCE: Witness - Credibility - Defendant's clerk giving evidence of contents of large number of documents made several years earlier purely from memory - No explanation as to how she could recall contents of those documents - Whether a credible witness

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The appellant/plaintiff carried on the business of supplying building materials. The respondent/defendant was a building and civil contractor who was appointed as the main contractor for several projects ("the said projects"). The appellant pleaded that at the request of the respondent made through one Soo Kock Leong ("Soo") who was the respondent's Project Coordinator, the appellant had supplied building materials and provided transportation services to the respondent ("the goods and services"). The appellant claimed a sum of RM423,103.91 said to be owing by the respondent for the supply of the goods and services to the respondent for the said projects. The respondent denied requesting the appellant to supply the goods and services for the said projects. The respondent claimed that almost 70% of the works on the said projects were sub-contracted to K.T.S Builders Sdn Bhd (KTS) in which Soo and one Tan Poh Eng

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- A were the directors. The respondent alleged that the request for the goods and services were made by Soo acting on behalf of KTS, and not the respondent. Soo had affirmed a statutory declaration (D15) and affidavit (D16) which were marked as IDs. The learned judge held both documents to be admissible under
- B s. 32(1)(c) of the Evidence Act 1950 and s. 73A of the same Act and concluded that the supply of the goods and services were requested by Soo on behalf of KTS and not the respondent. The learned judge found that Soo had never been given any power to order supplies of building materials from the appellant for the
- C respondent. The appellant's claim was thus dismissed and hence this appeal.

Held (allowing the appeal with costs)

Per Ahmad Maarop JCA delivering the judgment of the court:

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- (1) The reliability of DW6's (purchasing clerk for KTS) evidence was questionable, for, she gave evidence on the contents of not a just a few but a very large number of documents in the form of invoices and delivery orders made some seven years earlier relying purely on her memory. No explanation was given as to how she could recall the contents of those documents. Further, since she was no longer in the employment of KTS after 31 December 1994, she definitely was not in a position to give evidence on the invoices and other documents made in 1995. Thus it could not reasonably be said that D15 and D16 were consistent with the evidence of DW6. (para 10)
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- (2) The respondent failed to explain why the statements of account and numerous invoices and delivery orders had on them its rubber stamp marks. In para 4(f) of D16 Soo had stated that he had placed the respondent's rubber stamp marks on the aforesaid documents without the respondent's knowledge and authority and signed them in order to assist the appellant to obtain direct payment from the respondent. The statement of Soo in D16 was not consistent with the evidence of DW7 (a director of the respondent) because DW7 admitted that not all delivery orders were acknowledged by Soo and that some delivery orders were actually accepted by the respondent's employees. DW7 could not explain why acknowledgement of acceptance of certain materials supplied by the appellant was made by the respondent's employees. (para 10)
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- (3) Soo's statements in D15 and D16 could not be tested in court by the process of cross-examination, and this had severely affected the weight to be attached to the contents of D15 and D16. In the light of the circumstances in which D15 and D16 came to be introduced in evidence, it was not safe to rely on these two documents as credible basis to make finding of facts. D15 and D16 could not be given any weight. (para 16) A B
- (4) The appellant's evidence was supported by his lorry driver's evidence and by numerous documentary evidence in the form of the 4 statements of accounts, the relevant invoices, delivery orders and the respondent's company profile (P14). In P14, under the heading "List of key personnel", Soo was described as project co-ordinator. DW7 did not dispute P14 as the respondent's company profile and that Soo was described therein as the Project Co-ordinator. There was no need for the respondent to give the title "project co-ordinator" to Soo. Further, three payments were made by the respondent to the appellant. (paras 17 & 18) C D
- (5) The totality of all the evidence given on behalf of the appellant led to the inescapable conclusion that the supply of the goods and services were made at the request of the respondent, not KTS. There was privity of contract between the appellant and the respondent. If the learned judge had directed himself properly and adequately appreciated the totality of the evidence available before him, he would not have found that the appellant had not proven his case on the balance of probabilities. (paras 19 & 20) E F

Bahasa Malaysia Translation Of Headnotes

Perayu/plaintif menjalankan perniagaan membekalkan bahan-bahan binaan, sementara responden/defendan adalah kontraktor sivil dan binaan yang dilantik sebagai kontraktor utama bagi beberapa projek ('projek-projek tersebut'). Perayu memplidkan bahawa atas permintaan responden yang dibuat melalui seorang Soo Kock Leong ('Soo'), iaitu Penyelaras Projek responden, perayu telah membekalkan bahan-bahan binaan dan perkhidmatan pengangkutan kepada responden ('barang-barang dan perkhidmatan'). Perayu menuntut sejumlah RM423,103.91 yang dikatakan terhutang kepadanya oleh responden bagi pembekalan barang-barang dan perkhidmatan untuk projek-projek tersebut. Responden menafikan G H I

- A ada meminta perayu membekalkan barang-barang dan perkhidmatan untuk projek-projek tersebut. Responden mendakwa bahawa hampir 70% dari kerja-kerja di projek-projek tersebut telah disub-kontrakkan kepada K.T.S Builders Sdn Bhd ('KTS') di mana Soo dan seorang Tan Poh Eng adalah pengarah-pengarahnya. Responden mendakwa
- B seterusnya bahawa permintaan untuk barang-barang dan perkhidmatan adalah dibuat oleh Soo bagi pihak KTS, dan bukannya untuk responden. Soo telah mengikrar satu akuan berkanun (D15) dan affidavit (D16) yang ditanda sebagai ID. Yang arif hakim memutuskan kedua-dua dokumen sebagai boleh diterima-
- C masuk di bawah ss. 32(1)(c) dan 73A Akta Keterangan 1950 sambil merumuskan bahawa pembekalan barang-barang dan perkhidmatan adalah diminta oleh Soo bagi pihak KTS dan bukannya oleh responden. Yang arif hakim mendapati bahawa Soo tidak pernah diberi apa-apa kuasa untuk memesan bekalan bahan binaan daripada
- D perayu untuk responden. Tuntutan perayu dengan itu telah ditolak dan perayu merayu.

Diputuskan (membenarkan rayuan dengan kos)

Oleh Ahmad Maarop HMR menyampaikan penghakiman mahkamah:

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- (1) Kebolehpercayaan keterangan DW6 (kerani pembelian KTS) boleh dipersoalkan, kerana beliau memberi keterangan bukan mengenai beberapa dokumen tetapi tentang begitu banyak dokumen dalam bentuk inbois-inbois dan pesanan-pesanan
- F penghantaran yang dibuat tujuh tahun sebelumnya dengan hanya bergantung kepada ingatan beliau. Tiada penjelasan diberi tentang bagaimana beliau boleh mengingati kandungan dokumen-dokumen tersebut. Selain itu, oleh kerana beliau tidak
- G lagi bekerja dengan KTS selepas 31 Disember 1994, maka beliau tidak berada dalam keadaan yang membolehkan beliau memberi keterangan berkaitan inbois-inbois serta dokumen-dokumen lain yang dibuat pada tahun 1995. Oleh itu, secara munasabah, ianya tidak boleh dikatakan bahawa D15 dan
- H D16 adalah konsisten dengan keterangan DW6.
- (2) Responden gagal menjelaskan kenapa penyata akaun dan inbois-inbois dan pesanan-pesanan penghantaran yang bertimbuan-timbun tersebut bertanda dengan rubber stamp. Di
- I dalam perenggan 4(f) D16, Soo menyatakan bahawa beliau telah meletakkan tanda rubber stamp responden pada dokumen-dokumen tersebut di atas tanpa pengetahuan dan kebenaran responden dan juga menandatangani bagi

- membantu perayu mendapatkan bayaran secara terus dari responden. Kenyataan Soo di D16 adalah tidak konsisten dengan keterangan DW7 (seorang pengarah responden) kerana DW7 mengakui bahawa tidak semua pesanan penghantaran diperakukan oleh Soo dan bahawa sesetengah daripadanya adalah sebenarnya diterima oleh pekerja-pekerja responden. DW7 tidak dapat menjelaskan kenapa akuan penerimaan bagi sesetengah bahan yang dibekalkan oleh perayu dibuat oleh pekerja-pekerja responden. A B
- (3) Kenyataan Soo di D15 dan D16 tidak boleh diuji di mahkamah melalui proses pemeriksaan semula, dan ini telah menjejaskan dengan teruknya kadar kekuatan yang boleh diberikan kepada kandungan D15 dan D16. Mengambil kira halkeadaan di mana D15 dan D16 dikemukakan sebagai keterangan di mahkamah, adalah tidak selamat untuk bergantung kepada kedua-dua dokumen ini dan menjadikannya sebagai asas bagi membuat dapatan-dapatan fakta. Oleh itu, tiada sebarang penekanan harus diberikan kepada D15 dan D16. C D
- (4) Keterangan perayu telah disokong oleh keterangan pemandu lorinya serta banyak keterangan dokumentari yang wujud dalam bentuk 4 penyata akaun, inbois-inbois yang berkaitan, pesanan-pesanan penghantaran dan profil syarikat responden (P14). Di dalam P14, di bawah tajuk “Senarai pegawai-pegawai kanan”, Soo diperihalkan sebagai seorang Penyelaras Projek. DW7 tidak mempertikaikan P14 sebagai profil syarikat responden dan bahawa Soo telah diperihalkan di situ sebagai Penyelaras Projek. Tidak ada keperluan bagi responden untuk memberi pangkat “Penyelaras Projek” kepada Soo. Lagipun, sebanyak tiga bayaran telah dibuat oleh responden kepada perayu. E F G
- (5) Keseluruhan keterangan yang diberikan bagi pihak perayu membawa kepada konklusi tidak dapat tidak bahawa pembekalan barang-barang dan perkhidmatan adalah dibuat atas permintaan responden, bukannya KTS. Terdapat priviti kontrak di antara perayu dan responden. Jika yang arif hakim mengarahkan dirinya dengan secara wajar dan menilai dengan secukupnya keseluruhan keterangan yang ada di hadapannya, beliau pasti tidak akan mendapati perayu gagal membuktikan kesnya atas imbangan kebarangkalian. H I

- A Case(s) referred to:**
Dal Bahadur v. Bijai Bahadur, AIR [1930] Privy Council, 79 (**refd**)
PP v. Forster Frank Edald Heinrich [1987] 2 CLJ 177; [1987] CLJ (Rep)
872 HC (**refd**)
Taylor v. Witham, 3 Ch D 605 (**refd**)
- B Legislation referred to:**
Evidence Act 1950, ss. 32(1)(c), 73A(6)

For the appellant - M/s Muhammad Ganesan & Nazri
For the respondent - M/s Shook Lin & Bok
- C** [Appeal from High Court, Kuala Lumpur; Civil Suit No: S2(S4)-22-229-1995]

[Editor's note: For the High Court judgment, please see *Ng Chooi Kor v. Isyoda (M) Sdn Bhd* [2004] 1 LNS 567.]
- D** Reported by Amutha Suppayah

JUDGMENT

- E Ahmad Maarop JCA:**

Brief Facts Of The Case

- F** [1] The brief facts of the case are these. The appellant (the plaintiff in the court below) was at all material times carrying the business of supplying building materials such as rocks, sand and stones. He also provided transportation services such as lorries for hire. The respondent (the defendant in the court below) was a building and civil contractor. It held a Class A licence issued by the Pusat Khidmat Kontraktor, Kementerian Pembangunan Usahawan. At the material time, the respondent was appointed as the main contractor for the following projects ("the said projects"):
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- H** (a) the construction of Sekolah Sukan Negara, Bukit Jalil, Sri Petaling, Kuala Lumpur (the Bukit Jalil project);
- (b) the construction of low cost flats, Seksyen 20 Shah Alam, Selangor Darul Ehsan, for Perbadanan Kemajuan Negeri Selangor (the Shah Alam project);
- I** (c) the construction of Industrial Training Centre for handicapped people in Bangi, Selangor Darul Ehsan – Phase II (the Bangi project);

and

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- (d) the construction of Mimos Complex Technology Park Malaysia, Bukit Jalil, Kuala Lumpur (the Mimos project).

[2] The appellant pleaded that at the request of the respondent, he had supplied building materials and provided transportation services to the respondent. The appellant claimed that the said request of the respondent was made through one Soo Kock Leong ("Soo") who, according to the appellant, was the respondent's Project Coordinator. The sum of RM423,103.91 claimed by the appellant against the respondent in this case was for the supply of building materials and the provision of transportation services to the respondent for the said projects between July 1994 to mid March 1995.

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[3] The respondent denied requesting the appellant to supply the building materials and provide transportation services for the said projects. The respondent denied that Soo was its employee and had acted on its behalf to request for the supply of the building materials and the provision of the transportation services from the appellant. It was also the respondent's case that almost 70% of the works on the said projects were sub-contracted to K.T.S Builders Sdn Bhd (KTS) in which Soo and one Tan Poh Eng were the directors. The respondent alleged that the request for the supply of the building materials and the provision of transportation services were made by Soo, who was acting for and on behalf of KTS, and not the respondent. There was therefore no privity of contract for the supply of the building materials and the provision of transportation services between the appellant and the respondent. So argued the respondent.

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[4] In the court below the case was heard by two judges. Before going into retirement the first judge heard the evidence of the appellant (SP1) and his witness (SP2) as well as the evidence of six witnesses called by the respondent. The succeeding judge then continued the hearing of the case from where it was last adjourned by the first judge. He heard the evidence of two more witnesses called by the respondent after which the respondent closed its case. The learned succeeding judge then ordered both parties to file their respective written submissions. On 17 June 2004, the learned judge dismissed the appellant's case with costs. Being dissatisfied, the appellant filed an appeal to this court against that decision. Hence, the appeal before us.

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A The Decision Of The Court

[5] In his judgment, the learned judge in the court below said that the success or failure of the appellant's claim depended entirely on his findings on the following issues:

- B** (a) Whether the supply of the building materials and the provision of the transportation services were at the request of KTS or the respondent; and
- (b) Whether Soo was an employee of KTS or the respondent.

- C** [6] Commencing his discussion of the evidence led by both parties, the learned judge said that in his evidence the appellant denied having any dealing whatsoever with KTS, which denial was strongly disputed by the respondent. In this regard the learned
- D** judge referred to the evidence of DW1, a bank officer who testified that from the bank records, KTS had issued two cheques to the appellant on 5 July 1994 and 17 August 1994 in the sums of RM12,114.92 and RM86,509 respectively. The learned judge found that that evidence had not been denied by the appellant.
- E** He held that in the light of such evidence the appellant's claim that he had no dealings whatsoever with KTS could not be true:

- F** The Plaintiff's claim that he had no dealing whatsoever with KTS was strongly disputed by the Defence. DW1 (Tan Ah Ng), a bank officer with Union Overseas Bank (UOB), in his evidence, stated that he had records confirming that Lee Wah Bank which by a Court vesting order, was transferred to UOB. DW1 went on to state that from Lee Wah Bank records, KTS had issued two cheques to the Plaintiff on 5.7.1994 and 17.8.1994 amounting to RM12,114.92 and RM86,509.00, respectively. Such evidence
- G** was not denied by the Plaintiff. In the light of such evidence the Plaintiff's claim that he had no dealings whatsoever with KTS could not be true. In my view such payments could be very important and very relevant evidence. It must be remembered that the Plaintiff's claims was for **balance of payment** for the supply of building materials and transportation services for the period
- H** between July 1992 to March 1995. The payments made by any party to the Plaintiff during this period would be regarded as the party who placed the order for the supply and services unless otherwise explained. In this case the Plaintiff did not deny the payments he received from KTS. What was equally significant was that the Plaintiff did not offer any evidence to say that such
- I** payment by KTS was not for the supply of the building materials

and transportation charges. And the failure on the part of the Plaintiff to deny receiving such payment had made him an untruthful witness when he claimed in his evidence that he had no dealings with KTS.

[7] Dealing further with the evidence given on the respondent's behalf, the learned judge considered the evidence of DW6 (a purchasing clerk working for KTS between July 1994 to December 1994) who said that the appellant used to come to KTS's office 2 or 3 times a month to collect payment for the supply of sand and lorries for hire. Next, the learned judge referred to the evidence of DW7, a director of the respondent, who said that through Soo, KTS was appointed as the subcontractor of the respondent and was given about 70% of the construction works in the said projects. According to DW7, the agreement between KTS and the respondent was that KTS would appoint its own suppliers and be solely responsible for paying them, and that as far as the respondent was concerned it had no involvement whatsoever in the appointment of KTS suppliers. We pause to say that the agreement between the respondent and KTS must have been an oral agreement since there was nothing in writing to prove the terms and conditions of KTS' appointment as one of the respondent's sub-contractors. Finally, the learned judge dealt at length with Soo's statutory declaration sworn on 19 April 1995 (D15) and Soo's affidavit affirmed on 24 November 1995 (D16). In the court below, the appellant had objected to these two documents being admitted in evidence. No ruling was made by the first judge on their admissibility. They were therefore marked as IDs for the purpose of identification only. In his written submission in the court below, learned counsel for the respondent urged the court to admit the two documents under ss. 32(1)(c) and 73A of the Evidence 1950. In response, learned counsel for the appellant implored the court not to rely on the two documents as the appellant had no opportunity to cross-examine Soo. In his judgment the learned judge held both documents to be admissible under s. 32(1)(c) of the Evidence Act 1950 and s. 73A of the same Act. The learned judge concluded that the supply of the building materials and transportation services requested by Soo were for and on behalf of KTS and not the respondent. The learned judge found that Soo had never been given any power to order supplies of building materials from the appellant for the respondent. This is what the learned judge said in his judgment:

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- A Soo had never been given any power to order supplies of building materials from the plaintiff. It could not be the case where the Defendant should make order for supply of building materials because the Defendant had appointed KTS to be the sub-contractor for about 70% of the construction works. And Soo was
- B a Director of KTS. His affidavit and Statutory Declaration were consistent with the evidence of DW7, the Director of the Defendant and also the evidence of DW6, the former purchasing clerk of KTS. On the other hand PW1's evidence in denying that the Plaintiff had any dealing with KTS had been completely
- C rebutted by the evidence of DW1 who produced cheques issued by KTS in favour of the Plaintiff. The issue whether the Plaintiff had dealing with KTS was very relevant because that was the crux of the Defence case. Such denial cannot be said to be accidental. In my view it was deliberately done with an intention to tell a lie in order to ensure that the Defendant be found liable to the Plaintiff. It was with the same purpose that the invoices
- D were issued in the name of the Defendant. However it was found as a fact that most of the invoices were signed by employees of KTS. The wrongdoing of the Plaintiff with the assistance of KTS with the objective of making the defendant liable to the Plaintiff had been clearly explained by Soo in his affidavit. Those facts and
- E circumstances had convinced me to arrive at the conclusion that the story as narrated by Soo in his affidavit was true.

[8] In the end, the learned judge held that the appellant had failed to prove his case on the balance of probabilities:

- F With the evidence given by DW6 as well as the content of Soo's affidavit and Statutory Declaration it would be very difficult for the Court to be convinced that the Plaintiff had proved his case on a balance of probabilities especially so when the Plaintiff (PW1) had been found to be intentionally telling a lie as regards his
- G relationship with KTS.

- [9] Was the learned right in coming to the aforesaid conclusion? It is clear to us that D15 and D16 had weighed very heavily in the learned judge's finding that Soo's request to the appellant to supply the building materials and the transportation services was
- H made for and on behalf of KTS and not the respondent, and hence there was no privity of contract between the appellant and the respondent. Indeed these two documents constituted the main pillars of the respondent's case. The main points in D15 are Soo's statements that the respondent agreed to sub-contract works in
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respect of the said projects to KTS and Bayangan Abadi Sdn Bhd (of which Soo was one the shareholders and directors) on piece meal basis, no formal agreement setting out the precise terms of the sub-contract was drawn up and that in all his dealing with suppliers of materials and services and other third parties in respect of all the said projects, he had never acted as agent of the respondent. D16 was actually an elaboration and augmentation of Soo's statement in D15. The parts in D16 which are relevant to this appeal are paras 4(f) and (h):

- (f) I now crave leave to refer to the 4 statements of account and the various Invoices appearing as Exhibits "NCK-1" to "NCK-4" to Ng's 1st Affidavit bearing my signature. *When it became apparent that KTS Builders Sdn Bhd would not be able to make payments to the Plaintiff, the Plaintiff prepared the said Statements of Account and Invoices and together with the said Tan Poh Eng requested me to sign the same. I was told that by doing so the Plaintiff might be able to obtain direct payment from the Defendant. Without the knowledge and authority of the Defendant I then placed the Defendant's rubber stamp on the said documents without verifying them and signed them. I did not address my mind to the possible legal consequences of such an act.*
- (h) *I verily believe that the Plaintiff who had full knowledge of the actual arrangement between the Plaintiff and KTS Builders Sdn Bhd and between the latter and itself is trying to take advantage of a mistake on my part to obtain payment from the Defendant. In fact it may well be that part of the Plaintiff's alleged claim is fraudulent: in February 1995 KTS Builders Sdn Bhd had prepared a list of the trade creditors of KTS Builders Sdn Bhd a copy whereof is annexed hereto and marked as Exhibit "SKL-1". The Plaintiff's claim against KTS Builders Sdn Bhd then stood at only RM249,574.09 as compared to the RM423,103.91 it is now claiming. As stated earlier I did not verify the documents which the Plaintiff requested me to sign. (emphasis added)*

[10] The learned judge concluded that the story narrated by Soo in D16 was true. He found that Soo had never been given any authority by the respondent to order supplies of building materials from the appellant. He also found that D15 and D16 were consistent with the evidence of DW7 and DW6. First we deal with the evidence of DW6, who worked as a purchasing clerk for KTS from July 1994 to 31 December 1994. We find the reliability

- A of DW6's evidence to be questionable, for, she gave evidence on the contents of not a just a few but a very large number of documents in the form of invoices and delivery orders made some seven years earlier relying purely on her memory. No explanation was given as to how she could recall the contents of those documents. Further,
- B since she was no longer in the employment of KTS after 31 December 1994, she definitely was not in a position to give evidence on the invoices and other documents made in 1995. More particularly she would not be in a position to (and indeed she did not) give evidence relating to the four statements of account which
- C were dated 31 March 1995. Thus we do not know how it could reasonably be said that D15 and D16 were consistent with the evidence of DW6. Next, we turn to the learned judge's finding on D15 and D16 in relation to the evidence of DW7. In our view, the learned judge erred when he concluded that D15 and D16 were
- D consistent with the evidence of DW7. The respondent's case is that it had no contractual relationship with the appellant in respect of the supply of building materials and transportation services claimed by the appellant and that Soo was not its employee. However the respondent had to explain why the statements of account at p. 72,
- E Book 1 of the appeal records (RM128,704.92), p. 734, Book 4 of the appeal records (RM40,880.15), p. 927, Book 5 of the appeal records (RM27,360.20) and p. 1072 Book 6 of the appeal records (RM226,158.64) ("the four statements of accounts") and numerous invoices as well as delivery orders had on them its rubber stamp
- F marks. D15 and D16 were supposed to provide that explanation. In para 4(f) of D16 Soo had stated that he had placed the respondent's rubber stamp marks on the aforesaid documents without the respondent's knowledge and authority and signed them in order to assist the appellant to obtain direct payment from the
- G respondent. Thus, on the face of it, the statement in para 4(f) in D16 appeared to provide the explanation and indeed a defence to the appellant's claim. However, we do not think Soo's alleged admission that he had used (without the respondent's knowledge and authority) the latter's rubber stamp on those documents to
- H acknowledge receipt of the building materials mentioned thereunder provided a cogent explanation. We agree with the submission of the learned counsel for the appellant that the statement of Soo in D16 was not consistent with the evidence of DW7 because DW7 in his witness statement (in answer to question 69) had admitted that not
- I all delivery orders were acknowledged by Soo and that some delivery

orders were actually accepted by the respondent's employees. In his evidence under cross-examination DW7 could not explain why acknowledgement of acceptance of certain materials supplied by the appellant was made by the respondent's employees:

Saya tidak dapat memberi apa-apa penjelasan mengapa **cop defendan terus digunakan untuk pengesahan penerimaan bahan-bahan yang dibekal oleh plaintif kepada defendan.** (emphasis added)

The question is if it is true as claimed by Soo that he had used the respondent's rubber stamp on the statements of account and invoices without the latter's knowledge and authority in order to help the appellant obtain direct payment from the respondent although the respondent did not request for the building materials and services covered by the those documents, why were some delivery orders signed by the respondent's employees?

[11] Next, we feel that it is necessary to examine the circumstances in which D15 and D16 came about. In his evidence DW7 admitted that after receiving the appellant's notice of demand dated 17 May 1995 he discussed with Soo about it, and that Soo agreed to help the respondent defend the appellant's claim. It is significant to note that by then according to DW7's evidence, the respondent had taken over the works which were not completed by Soo's company (KTS) and this took place on 15 March 1995, and that the respondent had paid all payment due to KTS. D15 and D16 were introduced in evidence to challenge the appellant's application for summary judgment. D15 was introduced in evidence by DW7's first affidavit in reply (p. 101 of the Rekod Rayuan Tambahan 2) to reply to the appellant's supporting affidavit affirmed on 21 September 1995 (p. 3 of the Rekod Rayuan Tambahan 2). In that supporting affidavit, the four statements of account (on which Soo had placed the respondent's rubber stamp marks) and which formed the basis of the appellant's claim were exhibited as exhs. NCK 1, 2, 3 and 4. DW7's first affidavit (which introduced D15 in evidence) was affirmed on 27 October 1995. So, when DW7 affirmed his first affidavit he must have been aware of the four statements of account which had Soo's signature and the respondent's rubber stamp's marks on them. Yet DW7's first affidavit and D15 (dated 19 April 1995) mentioned nothing about Soo's unauthorised use

- A of the respondent's rubber stamp to stamp the four statements of account. Indeed in DW7's first affidavit, DW7 said that he had no knowledge as to how the respondent's rubber stamp was used on the four statements of account. In that affidavit DW7 also said that if the said rubber stamp was indeed that of the respondent (which was
- B denied) then the same would have been placed on the said documents by some unknown person or persons. This is surprising because by the time DW7 affirmed the affidavit he must have met Soo. However, less than a month later, in D16 which was affirmed by Soo on 24 November 1995 reference was made to the four
- C statements of account and invoices (para 4(f)). In para 4(f) Soo explained that he was asked by the appellant and Tan Poh Eng to sign those documents and that he had, without the knowledge and authority of the respondent, stamped those documents using the respondent's rubber stamp, and then signed them. The question is
- D if Soo's statement in para 4(f) of D16 was true, why was there no mention at all made in D15 about the event that had occurred as narrated in para 4(f) of D16?. The possible answer could be that the event narrated in para 4(f) of D16 occurred after D15 was affirmed by Soo. But that could not be accepted as the plausible
- E explanation because in D16 itself (which was affirmed and filed by Soo "in amplification and clarification of the matters set out" in D15), there is nothing to say that the event narrated in paragraph 4 (f) of D16 had occurred after D15 was affirmed. In our view therefore, the probability of the story in D16 not being true could
- F not be ruled out.

- [12] D16 was admitted in evidence by the court below under s. 32(1)(c) of the Evidence Act 1950. The principle upon which statements under s. 32(1)(c) are regarded as admissible in evidence
- G was explained by Lord Buckmaster in *Dal Bahadur v. Bijai Bahadur*, AIR [1930] Privy Council, 79 at p. 80:

- The principle upon which such statements are regarded as admissible in evidence is that in the ordinary course of affairs a person is not likely to make a statement to his own detriment unless it is true.* But this sanction is manifestly wanting in the case of a Hindu widow who, after a lifelong enjoyment of her husband's property, desires at the end to pass it on to her own relations, and for this purpose goes through the form of adopting her brother's grandson, to effectuate which she is bound to allege authority from her husband.
- H (emphasis added)
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[13] In other words, the real reason or motive for making the statement in question may negate the very principle upon which the admissibility of the statement is based. Thus, in *Taylor v. Witham*, 3 Ch D 605: 45 LJ Ch. 798, Jessel Mr said:

... it must be *prima facie* against his interest, that is to say, the natural meaning of the entry standing alone must be against the interest of the man who made it. Of course, *if you can prove aliunde that the man had a particular reason for making it, and that it was for his interest, you may destroy the value of evidence altogether*, but the question of admissibility is not a question of value. *The entry may be utterly worthless when you get it, if you show any reason to believe that he had a motive for making it, and that though apparently against his interest, yet really it was for it*, but that is a matter for subsequent consideration when you estimate the value of the testimony. (emphasis added)

[14] D16 was also ruled to be admissible by the learned judge in the court below under s. 73A of the Evidence Act 1950. In this regard s. 73A(6) of the same Act provides:

(6) In estimating the weight, if any, to be attached to a statement rendered admissible as evidence by this Act, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, and, in particular, to the question whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated, **and to the question whether or not the maker of the statement had any incentive to conceal or misrepresent facts.** (emphasis added)

[15] In para 4(f) of D16, Soo said that when it became apparent that KTS would not be able to make payments to the appellant, the latter prepared the said statements of account and invoices and then, together with one Tan Poh Eng requested him (Soo) to sign the same. Soo said he was told that by doing so the appellant might be able to obtain direct payment from the respondent. So, according to Soo, without the authority and knowledge of the respondent, he placed the respondent's rubber stamp on the said documents without verifying them, and then signed them. Soo was quick to add that he did not address his mind to the possible legal consequence of such an act. Thus, if what was said by Soo in para 4(f) was true, Soo became a party to a device to defraud the respondent. It is not difficult to see the benefit accruing to Soo – the appellant would obtain payment

- A directly from the respondent which according to Soo, was supposed to be paid by KTS (Soo's company). Then, we have the evidence of DW7 that Soo was prepared to help the respondent defend the claim brought against it by the appellant. This explained how D15 and D16 came to be introduced into evidence by the respondent.
- B Admittedly there is no evidence to show how or what sort of persuasion was employed by DW7 or the respondent on Soo which resulted in Soo making the alleged admission. But the important thing is that according to DW7's own evidence, Soo was prepared to help the respondent. Again it is not difficult to conclude the
- C benefit accruing on Soo. On the face of Soo's admission in D16, a fraud was committed on the respondent by Soo in cahoots with the appellant and one Tan Poh Eng. DW7's claim that Soo had used the respondent's rubber stamp without the respondent's authority and knowledge involved a large sum of money. Yet several years
- D after the fraud was discovered, until the case was heard and disposed of in court, there is nothing to show that the respondent had lodged any police report or taken any legal action against Soo. Soo got away scot free!
- E [16] All the matters which we have just discussed had escaped the scrutiny of the learned judge in court below in considering the weight to be given to D15 and D16. It was easy for the learned judge to say that he believed Soo. But unlike the appellant, Soo's statements in D15 and D16 could not be tested in court by the
- F process of cross-examination, and in our view this had severely affected the weight to be attached to the contents of D15 and D16 (see *Public Prosecutor v. Forster Frank Edald Heinrich* [1987] 2 CLJ 177; [1987] CLJ (Rep) 872). In our judgment, in the light of the circumstances in which D15 and D16 came to be introduced
- G in evidence which we have explained, it is not safe to rely on these two documents as credible basis to make finding of facts in support of the conclusion made by the learned judge that the appellant had failed to prove its case on the balance of probabilities. In our view, D15 and D16 should not be given any
- H weight.
- I [17] As against the evidence adduced in support of the respondent's case, we have the evidence of the appellant which was supported not only by his lorry driver's evidence, but more importantly by numerous documentary evidence in the form of the

four statements of accounts, the relevant invoices, delivery orders and the respondent's company profile (P14). In P14, under the heading "List of key personnel", Soo was described as project co-ordinator. According to the appellant he knew Soo as the project co-ordinator of the respondent and that Soo had requested him to supply building materials to the sites of the said projects. Soo had, on the appellant's request given the appellant P14 and his calling card (P10). The appellant said that he was convinced that Soo was a project co-ordinator working for the respondent. So, he supplied the building materials to the respondent. DW7 did not dispute P14 as the respondent's company profile and that Soo was described therein as the Project Co-ordinator, but explained the role played by Soo. According to DW7, as Project Co-ordinator of KTS, Soo was in the best position to brief the representatives of the respondent's clients, discuss with them and answer questions on technical aspects of the said projects. So the respondent gave Soo the title of project co-ordinator to enable Soo to deal direct with the representatives of the respondent's client:

Oleh itu, Defendan telah memberikan Encik Soo **gelaran** Penyelaras Projek bagi membolehkan beliau berurusan secara langsung dengan wakil-wakil dan perunding-perunding klien ...

No explanation was given as to why giving Soo the title of project co-ordinator would enable him to deal direct with those people mentioned by DW7. What about other sub-contractors of the respondent? There was no evidence to show that personnel of other sub-contractors were given similar title and role as Soo. In the circumstances we do not see the need for the respondent to give the title "project co-ordinator" to Soo to play the role claimed by DW7. Soo was after all KTS project co-ordinator. KTS was one of the sub-contractors for the said project. We see no reason why Soo could not play the role explained by DW7 in his capacity as KTS Project Co-ordinator. There was therefore no necessity to list Soo as one of the respondent's key personnel in P14, unless he was one of the respondent's employees or agents.

[18] Apart from the evidence which we have referred to there are also documents evidencing three payments made by the respondent to the appellant. The first is the payment of RM31,197.48 on or about 23 May 1994 by way of a letter of Credit pursuant to the appellant's invoice number 1209 dated

- A 18 May 1994. The second and the third were payment of RM2,760 and RM2,640 separately made by way of Bank Bumiputra Malaysia Berhad's cheques no. 117430 and 118358 dated 8 April 1995 and 19 April 1995 respectively. In respect of the first payment, DW7's evidence was that it was made by the respondent on behalf of KTS
- B because on or about May 1994, KTS was having cash flow problem:

- C Pada atau lebih kurang bulan Mei 1994, KTS Builders Sdn. Bhd. mengalami masalah aliran wang tunai. Pengarah mereka, seorang bernama Tan Poh Eng, telah menghubungi Pengarah Operasi Defendan, Tuan Haji Ismail bin Yeop Dahari untuk mendapatkan bantuan. Tan Poh Eng, telah meminta Tuan Haji Ismail supaya membuat pembayaran bagi pihak KTS Builders Sdn. Bhd. kepada Plaintiff.

- D Since Tan Poh Eng and Haji Ismail b. Yeop Dahari were not called to give evidence, the above statement was hearsay evidence and the truth of it was not proven. As for the second and the third payments, DW7 admitted that they were in respect of transportation services provided by the appellant to the respondent but the transactions took place after the respondent
- E had taken over part of the said projects which were not completed by KTS.

- F [19] In our judgment the totality of all the evidence given on behalf of the appellant lead to the inescapable conclusion that the supply of the building materials and the provision of the transportation services (the payment for which was claimed by the appellant in this case) were made at the request of the respondent, not KTS. There was privity of contract between the appellant and the respondent. We find nothing to show that the learned judge in the court below had adequately considered the various matters which we have explained at length. Instead, he placed too much emphasis on what he termed as the appellant's denial of his involvement with KTS. In this regard the learned judge said the appellant's denial was rebutted by the evidence of DW1 who produced cheques issued by KTS in favour of the
- H appellant. The learned judge concluded that the denial by the appellant was made deliberately with the intention to lie in order to ensure that the respondent be found liable to him. With respect, we cannot affirm such a finding. Having scrutinised the evidence adduced on behalf of the appellant ourselves we find
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that his denial of dealing with KTS was with regard to the said projects, which actually was consistent with his case that he supplied the building materials and provided the transportation services (for the said project) to the respondent, not KTS. As for the previous payment from KTS, the appellant had explained in his evidence that the payments were meant for a Hicom project, which was a separate project and had nothing to do with the said projects. This is what the appellant said:

Projek pertama Soo dikawalanya ialah di Hicom dan saya ada bekal barang-barang. Transaksi di Hicom dengan Soo dalam kira-kira tahun awal 90an. Hicom project tidak berkenaan dengan projek-projek Defendan. Hicom project adalah projek pertama saya dengan Soo.

Sebelum dari projek Defendan, saya Cuma Hicom sahaja. Perniagaan dengan Hicom – jumlah saya tidak ingat.

Pada masa projek Hicom, Soo Kock Leong tidak kenalkan dirinya untuk mewakili syarikat. Dengan Hicom bayaran dibuat oleh Soo Kock Leong. Bayaran dibuat syarikat Soo Kock Leong. Soo bayar cara cek. Cek-cek dikeluarkan syarikat Soo Kock Leong.

Cek-cek atas nama KTS Builders.

[20] We find nothing in the learned judge's judgment to show that that explanation by the appellant was considered by him. Like us, the learned judge did not have the audio-visual advantage of observing the appellant's demeanour in giving his evidence. So, in making his finding on the credibility of the appellant's evidence he could not rely on the demeanour of the appellant. Except for the two witnesses called by the respondent, like us the learned judge had to rely on the printed evidence and documents which form the appeal records in this case. We have considered all the evidence in the appeal records and the judgment of the learned judge very carefully. We are satisfied that if the learned judge had directed himself properly and adequately appreciated the totality of the evidence available before him, he would not have found that the appellant had not proven his case on the balance of probabilities.

[21] In the result, the appeal is allowed with costs. The order of the High Court is set aside. Judgment is entered for the appellant. Deposit to be refunded to the appellant.